

ESTTA Tracking number: **ESTTA705822**

Filing date: **10/30/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91223065
Party	Defendant C2 Management Group LLC
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Date	10/30/2015
Attachments	Mot Reconsider Decision re MTD_PN_TM_PAGN_10-30-15.pdf(134277 bytes)

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MOTION FOR RECONSIDERATION AND CLARIFICATION OF THE BOARD'S DECISION OF SEPTEMBER 30, 2015

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1 As further discussed herein, the Defendant requests that the Board reconsider its
2 decision. This jurisdictional decision involves regulatory and rule-making authority and
3 procedural issues. Defendant is considering a Petition to the Director, but believes that
4 the prudent course—supported by recommendations in various TTAB legal procedure
5 publications—is to provide an opportunity to supplement the current record, which, on
6 the contested factual and legal issues, were solely provided in the Board’s Decision of
7 September 30, 2015. Further, this additional information will either result in the
8 correction of the Decision or provide better information from which the Defendant can
9 decide whether a Petition to the Director should be undertaken.¹

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12 The Board first addressed the procedure before the Board:

13 That, in a given case, the Board has exercised this delegated ex parte
14 authority by granting an extension of time to oppose does not preclude an
15 applicant from later raising, in an inter partes opposition proceeding, as is
16 the case here, the correctness of that exercise of delegated authority. And
the appropriate means for raising such an issue is a motion to dismiss the
opposition for lack of jurisdiction.

17 Decision at *2-3.

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19 The Board addressed the Plaintiff’s request for an extension:

20 The record further demonstrates that on May 4, 2015 Opposer filed a
21 request to extend its time to oppose Applicant’s application by ninety days
22 on the ground that Opposer needed additional time to confer with its
counsel regarding the potential opposition.

23 Decision at *2.

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25 ¹ Although it does not appear to be a part of the Board’s Decision, the Applicant would like to correct
26 the record regarding the Board’s statement related to the “Applicant contends that it never received a
27 copy of the Board’s order granting Opposer’s request to extend its time . . .” Decision at fn. 3. The
order granting the request for an extension of time states that it was provided only to the attorney for the
Opposer, not the Applicant or the Applicant’s attorney.

1 Factually, the Board provided the following information—factual information
2 that was not provided by the Plaintiff in the opposition brief:

3 The record demonstrates that Opposer filed its request to extend its time to
4 oppose by employing the Board’s electronic filing system, i.e., ESTTA.
5 When filing a request to extend time that exceeds sixty days from the date
6 of publication, as is the case here, the ESTTA filing system allows the
potential opposer to choose from one of the following pre-populated
grounds as support for its extension request:

7 Decision at *3. What followed was drop-down form, “Cause for Extension Request,”
8 which included the categories, “The potential opposer needs additional time to confer
9 with counsel,” and “Other. Please explain briefly in the space provided below.”
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11 The Board then provided what are essentially three legal reasons for its
12 Decision—legal grounds that were not provided by the Plaintiff in the opposition brief:
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14 [Reason No. 1] By allowing a potential opposer to choose from one of the
15 foregoing grounds for extension, the Board has predetermined that any
one of these identified grounds constitutes good cause for an initial
extension request to oppose that exceeds sixty days from publication.

16 [Reason No. 2] Indeed, by long-standing practice, a simple statement that
17 the potential opposer needs additional time to investigate the claim or to
confer with counsel is considered by the Board as establishing good cause
18 for an extension of time to oppose. [Reason No. 3] Extensions of time to
19 oppose are limited in time (not to exceed an aggregate of 180 days from
publication) and the nature of the process, including the volume of
20 extension requests filed each year, does not lend itself to an in-depth
inquiry into the basis for each individual extension.
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22 Decision at *4.

23 The “good cause” requirement is solely a requirement on the potential Opposer,
24 hence the permitted *ex parte* nature of the proceeding. Thus this request for
25 reconsideration is based upon the Board’s conclusion that “Because Opposer chose a
26 ground that the Board has predetermined to constitute good cause for an initial
27

1 extension request that exceeds sixty days . . . the Board finds that Opposer has
2 demonstrated sufficient good cause for its extension request.” Decision at *4-5.

3 Defendant asserts that the three legal reasons provided for accepting the
4 Opposer’s request for a lengthy extension, including the drop down menu, do not
5 comply with the regulations and rules, and that any such conclusion amounts to a
6 change to the regulations and rules, which has not been implemented in violation of the
7 Administrative Procedures Act.
8

9 Except as otherwise provided, and wherever applicable and appropriate,
10 procedure and practice in *inter partes* proceedings shall be governed by
11 the Federal Rules of Civil Procedure.

12 37 CFR § 2.116(a). Nowhere in the Federal Rules of Civil Procedure (FRCP), or in the
13 application of the FRCP by the federal courts, is the “good cause” standard for an
14 extension of time met without addressing with particularity the length of the extension
15 requested, why the reason for the extension cannot be completed without the extension
16 requested, or other grounds.
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18 Nowhere in the TBMP does it state that any extension of time up to ninety days
19 can be met solely by asserting that a party needs to meet with counsel. Instead, the
20 TBMP does list some reasons that could constitute good cause:
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22 A showing of good cause for an extension of time to oppose over thirty
23 days *must* set forth the *reasons* why additional time is needed for filing an
24 opposition. Circumstances that may constitute good cause include
25 *applicant's consent* to the extension, *settlement negotiations* between the
26 parties, the filing of a *letter of protest* by the potential opposer, an
27 *amendment* of the subject application, the *filing of a petition* to the
28 Director from the grant or denial of a previous extension, and *civil*
litigation between the parties.

1 TBMP § 207.02 (emphasis added); 37 C.F.R. §2.102(c)(1) and (2). Further, the TBMP
2 directly states the plural “reasons,” which can only be provided with the fourth option in
3 the drop down menu, the option not chosen by the Opposer.

4 It is clear from the federal regulations and their application in the TBMP that the
5 30 day automatic extension—effectively extending the deadline to 60 days upon
6 request—is intended to encompass routine “conferring with counsel,” legal and factual
7 investigation, and the drafting and filing of the opposition. In the instant case, only the
8 confer with counsel reason was provided, and, without more, this is insufficient to meet
9 good cause.
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11 This is supported by the fact that the Board’s procedures incorporate and follow
12 the federal rules of civil procedure, and the application of the federal rules in similar
13 circumstances that address filing deadlines and extensions thereto do not support the
14 application provided in the Decision. For example, federal deadlines that provide for a
15 strict 28 day deadline for filing motions to amend judgment and 30 day deadline for the
16 filing of appeals may be extended upon good cause. Fed. R. Civ. Pro. 59(e)(“A motion
17 to alter or amend a judgment must be filed no later than 28 days after the entry of the
18 judgment.”); Fed. R. Civ. Pro. 58(e)(“Ordinarily, the entry of judgment may not be
19 delayed, nor the time for appeal extended . . .”); Fed. R. App. Pro. 4(a)(1)(A)(“the
20 notice of appeal required by Rule 3 must be filed with the district clerk within 30 days
21 after entry of the judgment or order appealed from.”). The failure to file such a pleading
22 in the required timeframe causes any late filed pleading to be stricken or dismissed as
23 the court lacks jurisdiction to hear such a motion or appeal. *Stephanie-Cardona LLC v.*
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1 *Smith's Food & Drug Ctrs., Inc.*, 476 F. 3d 701, 703 (9th Cir. 2007)(A timely notice of
2 appeal is a non-waivable jurisdictional requirement.”); *Sherman v. Quinn*, 668 F.3d 421,
3 424 (7th Cir. 2012)(“A timely notice of appeal is a prerequisite to appellate review.”).

4 Notably, the Federal Rules of Civil Procedure include a corresponding ability to
5 extend the time to file a notice of appeal, if the motion for extension is filed within 30
6 days, *see* Fed. R. App. Pro. 4(a)(5)(A)(i), and, the “party shows excusable neglect or
7 good cause.” FRAP 4(a)(5)(A)(ii). The federal trademark regulations, however, make
8 clear that they have analyzed FRAP 4(a)(5)(A)(ii) requirements and intend to limit
9 requests for extension to the “good cause” requirement. 37 C.F.R. §2.102(c)(1) and (2).
10 Also, similarly, the Federal Rules of Civil Procedure do not permit an extension for
11 filing a notice of appeal greater than the 30 day extension to be granted after the date
12 beginning the date for appeal—effectively extending the date for filing the notice of
13 appeal to 60 days. FRAP 4(5)(C).

14 The interpretations of the differing standards of “good cause” and “excusable
15 neglect” in the federal rules have been applied by federal courts:

16 The advisory committee note [regarding the 2002 amendments to Rule
17 4(a)(5)(A)(ii)] goes on to state that “[t]he good cause and excusable
18 neglect standards have ‘different domains.’ ” *Id.* (quoting *Lorenzen*, 896
19 F.2d at 232). The relevant question is one of fault, as “[t]he excusable
20 neglect standard applies in situations in which there is fault; in such
21 situations, the need for extension is usually occasioned by something
22 within the control of the movant.” *Id.* On the other hand, *the good cause*
23 *standard “applies in situations in which there is no fault—excusable or*
24 *otherwise.”* *Id.*

25 *Sherman v. Quinn*, 668 F.3d 421, 425 (7th Cir. 2012)(emphasis added). The “good
26 cause” requirement cannot be met when “events leading to the late filing were in [a
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1 party's] control.” *Id.* In applying this standard to the instant case, a potential opposer
2 has notice that they must submit their Opposition within the 60 day window after
3 publication, and the filing of the Opposition is entirely within the potential opposer's
4 control.

5 In the instant case, the federal trademark rules do not provide for an “excusable
6 neglect” standard that would excuse the failure to file within the original 30-day
7 opposition period, or the automatic 60-day upon-request extension period. In any event,
8 any motion for a lengthy extension (beyond 30 days) could not have met any “good
9 cause” requirement, and the “excusable neglect” standard does not apply. Thus, any
10 assertion that the Opposer relied upon some other party—including the Board—to
11 provide it with the right or ability to file an opposition more than 60-days after the date
12 of publication would not meet the “good cause” standard that is required.

13 The concept of good cause for an extension routinely arises in many federal
14 contexts, and nowhere is it applied as in the Board's Decision. Some examples in other
15 contexts:

- 16 1. “[T]he claimant failed to show "good cause" for an extension of time, since
17 there was nothing to prevent him from filing a request for a hearing during
18 the first month.”² SSR 68-8: SECTION 205(b) (Time Limitation For Filing
19 Request For Hearing -- Extension For Good Cause); 20 CFR 404.918,
20 404.954(a).

- 21 2. The administrative officer “may find good cause to extend the time limit only
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27 ² https://www.socialsecurity.gov/OP_Home/rulings/oasi/33/SSR68-08-oasi-33.html

1 if the provider demonstrates in writing it could not reasonably have been
2 expected to file timely due to extraordinary circumstances beyond its control
3 (such as a natural or other catastrophe, fire, or strike).” 42 CFR 405.1813
4 (Good cause extension of time limit for requesting an intermediary hearing).

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- 6 3. “Circumstances impeded the claimant’s efforts to pursue his or her claim or
7 appeal another issue.” SSN GN 03101.020 (Good Cause for Extending the
8 Time Limit to File an Appeal).³
- 9
- 10 4. “The claimant was seriously ill and was prevented from contacting SSA in
11 person, in writing, or through a friend, relative, or other person.” *Id.*
- 12
- 13 5. “There was a death or serious illness in the claimant’s immediate family.” *Id.*
- 14
- 15 6. Pertinent records were destroyed or damaged by fire or other accidental
16 cause.” *Id.*
- 17
- 18 7. The claimant was diligently seeking evidence to support his or her claim, but
19 did not finish before the time period expired. *Id.*

20 While these federal examples of the good cause application in requests for extension
21 were provided in other branches and separate regulations, it is clear that there must be a
22 particularized statement addressing the length of time requested and inability to comply
23 with the existing length of time or a shorter length of time.

24 The second pre-populated category (additional time to confer with counsel) of
25 the drop down menu on the ESSTA form does not comply with the ability to meet good
26 cause for a ninety (90) day extension, for a total request of 120 days. It does not “state

27 ³ <https://secure.ssa.gov/poms.nsf/lnx/0203101020>

1 with particularity the specific grounds on which it is based.” FRCP 27(a)(2)(Content of
2 Motions). It does not state why a 30 day extension—or even a 60 day extension—for a
3 total of 60 or 90 days, is insufficient to confer with counsel.

4 An absolute pre-determined decision that a ninety (90) day extension request for
5 the sole reason that the party needs additional time to confer with counsel, without
6 more, constitutes a de-facto rule and rule change as it is does not comply with the
7 federal rules or any known regulations or application thereof.
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9 (4) “rule” means the whole or a part of an agency statement of general or
10 particular applicability and future effect designed to implement, interpret,
11 or prescribe law or policy or describing the organization, procedure, or
12 practice requirements of an agency and includes the approval or
13 prescription for the future of rates, wages, corporate or financial structures
14 or reorganizations thereof, prices, facilities, appliances, services or
allowances therefore or of valuations, costs, or accounting, or practices
bearing on any of the foregoing;

15 (5) “rule making” means agency process for formulating, amending, or
16 repealing a rule;

17 5 U.S.C. § 551 (APA Definitions). The Defendant’s counsel is unaware of any previous
18 rule, regulatory procedure or even a decision that addressed this issue. Defendant thus
19 asserts that the Board had no authority for making such a pre-determined decision or
20 interpreting and implementing the good cause regulation as it appears to have done so in
21 this instance. 5 U.S.C. § 553 (Administrative Procedures Act (APA) Rule making).⁴
22

23 WHEREFORE, the Board is requested to grant this Motion For Reconsideration
24 And Clarification Of The Board’s Decision Of September 30, 2015.
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26 ⁴ As further addressed in the Defendant’s original motion to dismiss, if the grounds for the Opposer’s
27 extension request were insufficient, the impact on the potential Opposer is clear. To be certain that an
28 appeal can proceed, it is clear from all the authorities that the potential opposer has to file their
opposition within 60 days after the mark’s publication.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2015, a true and complete copy of the foregoing **Motion For Reconsideration And Clarification Of The Board's Decision Of September 30, 2015** has been served on the below opposing counsel/party of record by mailing said copy via First Class Mail, postage prepaid to:

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